MOTION FILED
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No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services, *Petitioner*

v.

JANET J. YUCKERT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

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MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARUGMENT

Respondent hereby moves, pursuant to Sup. Ct. R. 35.5 and 35.6, for leave to file the attached Supplemental Brief. The purpose of this brief is to bring to the Court's attention new evidence regarding the potential effect of changes in Petitioner's policy, embodied in Social Security Ruling 85-28, on the disposition of Respondent's claim.

Counsel for respondent obtained this document on April 7, 1987, the day after it was released from the coverage of a protective order in *Stieberger* v. *Bowen*, 84 Civ. 1302 (LBS) (S.D. N.Y.).

As is discussed in the Supplemental Brief, the document clearly suggests that, if respondent's claim were remanded for review under SSR 85-28, her claim would not be denied as "non-severe." This is contrary to the position which the Solicitor took in oral argument before this Court, in response to questions from Justice O'Connor.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Attached to this Supplemental Brief is a one-page document, from the Associate Commissioner, Office of Hearings and Appeals, to the Chairman, Acquiescence Task Force, regarding: "Memorandum of Intent to Publish Ruling of Acquiescence—Invalidation of Step Two of the Sequential Evaluation Process-ACTION." The memorandum is dated November 20, 1985.[1]

Respondent has consistently argued that his Court need not and should not reach the validity of Social Security Ruling 85-28 in order to decide the outcome of this case. Brief for Respondent at 29. This remains Respondent's position. Nonetheless, because of the possibility that this Court will find otherwise, Respondent wishes to direct the Court's attention to the following statements in the attached memorandum:

> ". . . The *Baeder, Johnson*, and *Yuckert* cases were not adjudicated by the Agency under the new or clarified policy enunciated in SSR 85-28. *Had they been, it is quite unlikely that they would have been decided at Step 2.*"
>
> * * *
>
> ". . . All three of the claimants [including Janet Yuckert] had some prior work experience and thus the issue of establishing a prima facie case of disability once it is proved that the applicant cannot

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[1] This document was supplied to Respondent's counsel on April 7, 1987 by plaintiffs' counsel in *Stieberger* v. *Bowen*, 84 Civ. 1302 (LBS) (S.D. N.Y.), after the district court in that case lifted a protective order so as to permit release of the document to *Yuckert* counsel. The document was originally provided by the Secretary in reply to discovery requests in *Stieberger.*

The "Acquiescence Task Fore" is an ad hoc group within SSA, created in 1985, to determine whether the Secretary was in compliance with various decisions of the Circuit Courts of Appeals.

perform prior work was present in each case. *Under SSR 85-28, if similar facts are present in a case, it may not be denied at Step 2.*"

(Emphasis added.)

These statements were made by the head of the Office of Hearings and Appeals, the office which would readjudicate Mrs. Yuckert's claim if it was remanded. They are contrary to the position taken by the Solicitor in oral argument before this Court, when questioned by Justice O'Connor:

Question: And was the respondent's claim evaluated under the Secretary's guidelines 85-28, which talk now in terms of some minimal impairment?

Mr. Kneedler: That interpretive ruling was not in effect at the time that—

Question: So presumably this respondent's claim was not evaluated at Step 2 with that guideline in mind.

Mr. Kneedler: But that guideline as the Secretary made clear in promulgating it, does not state a new policy. It reflects what the proper standard of adjudication should have been and was under the program prior to that time.

Question: Well, it certainly might have been helpful to the administrator considering the claim to have had that in mind, at least if you read about this particular respondent's problems, it would appear anyway that they might well have survived step 2 under that guideline.

Mr. Kneedler: No, I think it is important to bear in mind here, not to focus on respondent's allegations and testimony but the ALJ specifically found that she was exaggerating those claims. He found no objective clinical evidence to suggest the severity of those

symptoms to that extent, so that I think that there is—*it would certainly be our position that even in light of the ruling which we think didn't change things, that her case would have come out the same.*

Question: Well, wouldn't it perhaps be appropriate even if you are correct to remand Ms. Yuckert's claim at least, leave it open in light of the new guidelines?

Mr. Kneedler: I think not, because applying—first of all we would have a concern there about courts sending cases back in light of the new ruling because it suggests the potential for reopening a lot of past claims, even those that are not currently surviving, and *in our view because the ruling did not change the substantive standard of disability, there is no occasion to sent it back. . . .*

Transcript of Oral Argument, January 13, 1987, pp. 7-9 (emphasis added).

Therefore, were the Court to conclude that SSR-85-28 is in any way relevant to the disposition of Ms. Yuckert's case, it would be appropriate for this Court to remand the case for further action in light of SSR-85-28.

Respectfully submitted,

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APPENDIX

MEMORANDUM

DATE: Nov. 20 1985

FROM: ASSOCIATE COMMISSIONER
OFFICE OF HEARINGS AND APPEALS

SUBJECT: MEMORANDUM OF INTENT TO PUBLISH RULING OF ACQUIESCENSE—INVALIDATION OF STEP TWO OF THE SEQUENTIAL EVALUATION PROCESS—ACTION

TO: CHAIRMAN, ACQUIESCENCE TASK FORCE

This is in response to your memorandum of November 5 concerning the courts' holding in *Baeder*, *Johnson*, and *Yuckert*. We have a number of problems with these proposed rulings of acquiescence and recommend that they not be published at this time.

Basically, events have overtaken the need for these acquiescence rulings. We are under the impression that SSR-85-28 is, in effect an acquiescene ruling, accommodating SSA policy to circuit court decisions on Step 2 of the sequential evaluation process. The *Baeder*, *Johnson*, and *Yuckert* cases were not adjudicated by the Agency under the new or clarified policy enunciated in SSR 85-28. Had they been, it is quite unlikely that they would have have been decided at Step 2.

As we understand SSR 85-28, if a claimant's impairment produces limitations (no matter how minimal or slight), then consideration should be given to how they affect the ability to perform past relevant work (PRW). If

PRW is, in fact, precluded, then Step 2 may not be used. We fail to see how this deviates from the holdings of the courts in the three cited cases. The step that was invalidated is not the one described in SSR-85-28.

If these three rulings are published, we believe that they would have little, if any, impact on our ultimate administrative decisions. All three of the claimants had some prior work experience and thus the issue of esablishing a prima facie case of disability once it is proved that the applicant can not perform prior work was present in each case. Under SSR 85-28, if similar facts are present in a case, it may not be denied at Step 2. Invalidating Step 2 when it may not be used in any event appears to be a distinction without a difference. Therefore, if SSR 85-28 is properly applied, we do not see how a vehicle to relitigate the issue presented in *Baeder, Johnson*, and *Yuckert* would arise.

Thank you for the opportunity to comment.

Frank V. Smith III